

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

GRISWOLD V. MOWBRAY

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

RICHARD A. GRISWOLD, APPELLANT,
V.
JAMES R. MOWBRAY, APPELLEE.

Filed May 8, 2012. No. A-11-788.

Appeal from the District Court for Gage County: DANIEL E. BRYAN, JR., Judge.
Affirmed.

Richard A. Griswold, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellee.

MOORE, CASSEL, and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Richard A. Griswold appeals from an order of the district court for Gage County, granting summary judgment in favor of James R. Mowbray. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

BACKGROUND

Following a jury trial, Griswold was convicted on May 22, 2008, of second degree murder and use of a firearm to commit a felony. He was represented at trial by Mowbray through the Nebraska Commission on Public Advocacy. The district court sentenced Griswold to life imprisonment for second degree murder and to 50 years' incarceration for the use of a firearm conviction.

Griswold filed a motion for postconviction relief on February 23, 2009, alleging that he received ineffective assistance of counsel from Mowbray at trial. The outcome of the

postconviction action is not found in the record before us and is not relevant to our analysis of this appeal.

On March 14, 2011, Griswold filed a complaint in the district court against Mowbray for legal malpractice, misrepresentation, and negligence in connection with Mowbray's representation of Griswold in the criminal case. The complaint included allegations that Griswold had complied with the State Tort Claims Act in filing a claim against Mowbray. We note that Griswold's tort claim was filed on October 27, 2010, and was denied by the State Claims Board on February 18, 2011. Mowbray was served personally with Griswold's negligence complaint on March 22. Griswold filed an amended complaint after his original complaint was dismissed for failure to make the necessary assertions of his innocence of the crimes for which he was convicted.

On August 30, 2011, the district court granted summary judgment in Mowbray's favor. The court found that service of process was not made in the manner provided by Neb. Rev. Stat. § 25-510.02 (Reissue 2008), since Mowbray was served personally and not in his official capacity. Accordingly, the court concluded that there could be no judgment against the State of Nebraska or any of its subdivisions and that the action was one for professional negligence against Mowbray personally.

The court concluded further that even if there had been proper service on Mowbray in his capacity as "public defender," Griswold's claim would have been barred by the 2-year statute of limitations set forth in Neb. Rev. Stat. § 81-8,227 (Cum. Supp. 2010). Because Griswold was convicted by a jury on May 22, 2008, the court concluded that Mowbray's alleged negligence occurred prior to or on May 22. Griswold filed his tort claim with the State Claims Board on October 27, 2010, more than 2 years after the claim accrued. The court concluded that Griswold was not allowed any tolling of the statute of limitations under Neb. Rev. Stat. § 25-213 (Reissue 2008) based on his incarceration and that he presented no evidence in support of his claim that his mental disorder tolled the statute. The court noted that at the summary judgment hearing, Griswold submitted a report by a licensed psychologist from December 2007, stating that due to emotional difficulties, Griswold was not competent to stand trial at that time. The court stated, "Obviously this designation changed prior to his trial and conviction on May 22, 2008."

The district court concluded that Griswold's claim was also barred under Neb. Rev. Stat. § 25-222 (Reissue 2008), the 2-year statute of limitations applicable to Griswold's action against Mowbray personally for professional negligence. The court found that Griswold's professional negligence action was filed on March 14, 2011, well beyond the 2-year period.

Because Griswold offered no evidence to support any exception that would toll the statute of limitations, the district court granted summary judgment in Mowbray's favor. Griswold subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

Griswold asserts, consolidated and restated, that the district court erred in finding that no exception applied to toll the applicable statute of limitations in this case.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, ___ N.W.2d ___ (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012).

ANALYSIS

Griswold asserts that the district court erred in finding that no exception applied to toll the applicable statute of limitations in this case. Specifically, he argues that the court erred in denying him the benefit of the tolling statute based upon his mental disorder and incarceration. Griswold also takes issue with the district court's findings that he offered no evidence to support any exception that would toll the statute of limitations and that his incompetence to stand trial had obviously changed prior to his trial and convictions.

The district court first found that Griswold had not complied with Neb. Rev. Stat. § 81-8,212 (Reissue 2008), which requires that “[i]n any suit brought under the State Tort Claims Act, service of process shall be made in the manner provided for service of a summons in section 25-510.02.” Section 25-510.02(1) provides:

The State of Nebraska, any state agency as defined in section 81-8,210, and any employee of the state as defined in section 81-8,210 sued in an official capacity may be served by leaving the summons at the office of the Attorney General with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General.

Since Mowbray was served personally and not in his official capacity, the court concluded that there could be no judgment against the State of Nebraska or any of its subdivisions and that the action was one for professional negligence against Mowbray personally. Griswold does not challenge this conclusion on appeal.

Even if Griswold had properly perfected service under § 25-510.02, his action would be barred by the statute of limitations applicable to claims under the State Tort Claims Act. Section 81-8,227(1) provides in part, “Except as provided in subsection (2) of this section, every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the Risk Manager in the manner provided by such act.” The district court reasoned that because Griswold was found guilty by a jury on May 22, 2008, Mowbray's alleged negligence occurred on or prior to May 22. Griswold filed his claim with the State Claims Board on October 27, 2010, more than 2 years after the claim accrued. The court did not err in concluding that Griswold's claim was barred by the statute of limitations.

The district court also found that any claim against Mowbray personally for professional negligence was barred by § 25-222, which provides:

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Griswold filed this action against Mowbray individually for professional negligence on March 14, 2011, well outside of the 2-year period. The court did not err in finding Griswold's claim was barred by the statute of limitations found in § 25-222.

The district court also found that the tolling statute could not be applied in this case. Section 25-213 provides, in part:

Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in Chapter 25, the Political Subdivisions Tort Claims Act, the Nebraska Hospital-Medical Liability Act, the State Contract Claims Act, the State Tort Claims Act, or the State Miscellaneous Claims Act, except for a penalty or forfeiture, for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by Chapter 25 after such disability is removed.

The district court correctly concluded that Griswold was not allowed any tolling of the limitations period based solely upon his incarceration. A showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required to entitle a prisoner to have the statute of limitations tolled during imprisonment. *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996).

Griswold claims he should be given the benefit of the tolling statute based upon his alleged mental disorder. A person with a mental disorder under § 25-213 is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action. *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011). A mental disorder within the meaning of § 25-213 is an incapacity which disqualifies one from acting for the protection of one's rights. *Id.*

At the summary judgment hearing, Griswold submitted various exhibits, including a copy of a December 14, 2007, report from a licensed psychologist concerning his competency at that time. The psychologist concluded:

[I]t is the opinion of the undersigned that . . . Griswold displays the capacity to understand the nature and object of the proceedings against him as well as comprehends

his own condition in reference to such proceedings. However, the defendant's emotional difficulties involving depressive and posttraumatic issues pose substantial challenges to the defendant's ability to assist with a rational defense. Therefore, it is the opinion of the undersigned that . . . Griswold is not competent to stand trial at this time.

It is the evaluator's belief that the defendant does present a substantial likelihood of his competency to stand trial being restored in the foreseeable future. However, . . . Griswold will require a brief inpatient hospitalization for medication management and symptom stabilization.

Other exhibits submitted by Griswold show that on January 15, 2008, a motion to determine his mental competency to stand trial in the criminal proceedings was filed and that on January 30, Mowbray withdrew the motion to determine competency and asked the court to set the criminal case for jury trial. The exhibits also show that at some point prior to February 19, Griswold was transported from the county jail, where he was on a "suicide watch," to the Diagnostic and Evaluation Center in Lincoln, Nebraska.

Griswold did not submit any evidence documenting his condition after January or February 2008, when he was transported to the Diagnostic and Evaluation Center, aside from the fact that he stood trial for the criminal charges in May 2008. Specifically, there is no evidence to support a finding that Griswold suffered from a mental disorder on or around May 22, 2010, when the statute of limitations for filing a tort claim and a malpractice action expired. Further, the record shows that Griswold filed a pro se motion for postconviction relief in February 2009, alleging ineffective assistance of trial counsel, which is evidence of his competence to understand his legal rights at that time.

After viewing the evidence in the light most favorable to Griswold, we conclude that the district court did not err in finding that Griswold failed to present evidence to support his assertion that he should be given the benefit of the tolling statute based upon his alleged mental disorder.

Griswold also complains that the district court erroneously found that Griswold's incompetency to stand trial, as determined by the psychologist in December 2007, had obviously changed prior to his trial and conviction on May 22, 2008. We conclude that even if this statement is not specifically supported by the record, it was a reasonable inference to be deduced from all of the evidence and such finding does not render the summary judgment reversible error. In short, the evidence does not show a genuine issue of material fact concerning Griswold's alleged incompetency at or near the expiration of the deadline for filing his tort claim.

Finally, we note that the discovery exception found in § 25-222 does not apply in this case. The discovery exception of § 25-222 is a tolling provision which permits the filing of an action after the 2-year statute of limitations only in those circumstances where the cause of action was not discovered and could not reasonably have been discovered within that period. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). The 1-year discovery exception of § 25-222 is inapplicable when a plaintiff discovers his or her cause of action while the statute of limitations period is still running. *Carruth v. State*, *supra*. Griswold filed his postconviction action on February 23, 2009. A review of the ineffective assistance of counsel assertions in that motion show that he had "discovered" Mowbray's alleged negligence within the original 2-year statute of limitations.

Viewing the evidence in the light most favorable to Griswold and giving him the benefit of all reasonable inferences deducible from the evidence, we find that the district court did not err in granting summary judgment in favor of Mowbray.

CONCLUSION

The district court did not err in granting summary judgment in favor of Mowbray.

AFFIRMED.